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Abbreviations:

"T."	Transcript
"L.F."	Legal File

TABLE OF AUTHORITIES

Other Authorities:

JURISDICTIONAL STATEMENT

Respondent adopts the Jurisdictional Statement of Appellant.

STATEMENT OF FACTS

A. INTRODUCTION

Plaintiff Bryant Moore, Jr., Respondent, by and through his father and Next Friend, Bryant Moore, Sr., hereby responds to the Appeal of Defendant Bi-State Development Agency, Appellant, in a case involving serious injuries to Respondent. Respondent was seriously injured when he was struck by a Ford Ranger pickup truck while attempting to cross Caseyville Road in Collinsville, Illinois, on the morning of January 25, 1999, after being dropped off by Appellant's bus. A suit was brought on Respondent's behalf alleging that Appellant discharged him from its bus at an unsafe location causing him to cross Caseyville Road and be struck by an oncoming vehicle. (L.F. 1 at 30-35) A jury returned a verdict in Respondent's favor assessing 51% fault to Appellant and 49% fault to Respondent and awarded $7,750,000.00 in damages. (L.F. 1 at 111) In addition to facts relevant to the accident, Respondent also presents facts pertinent to Appellant's appellate issues concerning juror misconduct during voir dire and instructional error regarding the verdict director.

B. RESPONDENT'S ACCIDENT

Respondent was a fourteen-year-old high school freshman at Collinsville High School in Collinsville, Illinois, in January, 1999. (T. 359, 497) Respondent enrolled in college preparatory classes called "Zero Hour" which were held at 7:00 a.m., an hour before normal school hours. (T. 331, 360-361) Collinsville High School did not provide transportation for students taking the early "Zero Hour" classes, therefore, students had to

arrange for their own transportation to school. (T. 330-331) Because Respondent's father worked evenings, and did not want his son home alone, he made arrangements for his son to spend school nights at his grandmother's house who lived about 2 1/2 blocks from Appellant's bus stop. (T. 329-330, 359-360) To permit Respondent to attend "Zero Hour" classes, he and his father decided he could ride the Appellant's bus from the stop at the corner of Clay and Hesperia, near his grandmother's house, to Collinsville High School. (T. 331, 360) Both Respondent's father and mother had instructed him on safely crossing streets before Respondent started riding Appellant's bus to school. (T. 364, 495) Additionally, Respondent had two year's of limited experience riding buses and the Metrolink as well as crossing some busy streets unsupervised. (T. 365, 496-497)

On most school days beginning in August, 1993, Respondent would leave his grandmother's house to catch Appellant's bus at about 6:00 a.m. (T. 359, 361) Appellant's bus would pick up Respondent some time before 6:15 a.m. and Respondent was the only passenger during that stretch of time. (T. 521) Appellant's bus driver, Carl Stroughter, had been driving this particular route since December, 1998, and was familiar with Respondent and knew his destination was Collinsville High School which was across Caseyville Road from the drop off. (T. 519, 553, 557) Initially, Stroughter would let Respondent off of Appellant's bus at the intersection of Caseyville Road and Morrison Road, because the bus stop was placed there before being torn down. (T. 371-372, 553-554) Thereafter, Stroughter began allowing Respondent off along the side of Caseyville Road near a rear school service road pursuant to his implementation of Appellant's policy regarding

passenger requested stops. (T. 547) That policy allowed passengers to request stops after 7:00 P.M. until the end of service for that particular day at any place where it's safe to let them off. (T. 471, 474-475)

January 25, 1999, it remained dark between 6:20 a.m. and 6:30 a.m. (T. 434, 523) According to the only eyewitness, Arcadio Aburto, who was driving directly behind Appellant's bus for approximately one half a mile, as the bus approached Collinsville High School in the southbound lane of Caseyville Road, it came to a stop entirely in the road about 45 to 50 feet south of the school service road. (T. 436-440, see also Exhibits 16 and 20 attached) At this point, Caseyville Road is a two lane road with a speed limit of forty-five miles per hour with no bus stop, sidewalk, shoulder, or pedestrian crossing marking, and the nearest traffic control device, a boulevard stop, is further south at the intersection of Morrison Road some 800 feet away. (T. 440-441, 538, 598) Aburto testified that he was about thirty feet behind the bus and the bus was 45-50 south of the school service road near the only light standard on this stretch of road. (T. 439-440, 600) Aburto testified that Respondent walked on the grass along the side of the bus, then on to the pavement and across the back of the bus directly in front of him. Aburto testified that Respondent turned and looked at him while he was sitting in his van, then continued across Caseyville Road at a faster pace. (T. 441-444) Finally, Aburto testified that Respondent was only able to take one and one half steps into the northbound lane of Caseyville Road before he was struck by a Ford Ranger pickup driven by William Crowell which was traveling northbound on Caseyville Road. (T. 445)

C. JUROR NONDISCLOSURE

During voir dire by counsel for Respondent, when counsel was seeking to determine whether or not any venireperson recognized any of the parties or lawyers involved in the litigation, venireperson Marion Shands volunteered without any prompting that she had a claim against Appellant for injuries resulting from a vehicle collision with a bus she was on. (T. 72-73) Later, Respondent's counsel inquired of the panel whether a venireperson had ever been a party to a lawsuit and venireperson Shands again responded reiterating the collision incident as well as two Workers' Compensation claims against the City of St. Louis. (T. 147-148) Still later, Respondent's counsel inquired again to the panel about claims that did not ripen into a formal lawsuit but couched his question with the caveat that some venireperson had already disclosed this information. (T. 163) Venireperson Shands did not respond.

Under direct questioning to her by Appellant's counsel, regarding whether or not she was presently a plaintiff against Appellant, venireperson Shands stated not presently but in the past. (T. 233) Later, when Appellant's counsel inquired of the panel about any claims for injuries where they were asking for money damages venireperson did not respond. (T. 238-241)

A verdict was rendered for Respondent against Appellant and Juror 11, Marian Shands, did not sign the verdict. (L.F. 1 at 111)

Subsequent to the jury verdict, Appellant filed a Motion for Judgment Notwithstanding the Verdict, New Trial or Remittutur alleging, inter alia, juror misconduct

on the part of Ms. Shands in failing to reveal lawsuits and claims. (L.F. 1 at 137) At the hearing on the new trial motion, Appellant's counsel called Ms. Shands as a witness (T. 712) Ms. Shands testified, with prompting from Appellant's counsel, that she had reported a fall on a bus in July of 1994 and that an adjuster came to her place of employment and offered $50.00. (T. 730-732) Appellant's counsel then presented Appellant's computer printout showing that Ms. Shands had received $150.00, yet she again stated that she never made a claim but merely reported the incident to Appellant. (T. 733)

Ms. Shands testified, again with prompting from Appellant's counsel, that she had reported an incident in April of 1997, where she boarded a bus in the rain, the bus started up with a jerk, and she fell. (T. 734) Ms. Shands reported this incident to Appellant, was advised that the bus driver did not recall the incident, and neither received any money nor pursued any claim against Appellant. (T. 734-735) Ms. Shands testified that she had not made "claim" but rather had reported the incident because she thought there was something wrong with the bus. (T. 734) Lastly, after prompting from Appellant's counsel, Ms. Shands testified that in May, 1999, she reported getting sick from fumes on a bus and received $50.00 from Appellant's adjuster. (T. 737-739, L.F. 1 at 175-185) Ms. Shands admitted to reporting the incident, and similar to the 1994 incident accepted an offer of $50.00 for inconvenience from Appellant's adjuster. (T. 740-741, L.F. 1 at 188) Ms. Shands did not respond during voir dire with any information about the incidents of 1994, 1997, 1999, in which she apparently suffered minor injuries and received a total of $200.00 from Appellant's adjuster without ever filing a claim or contacting an attorney. When asked at the

hearing on Appellant's Motion for a New Trial, Ms. Shands testified that Appellant's counsel was "bringing up things that I have forgotten". (T. 744) When asked whether she had disclosed the three incidents Ms. Shands stated, "I disclosed what I remembered at the time.". (T. 744) Detailed information about each one of these incidents was immediately available to Appellant via their DAVID computer system at any time during the week long trial. (T. 752-753)

D. COURT'S VERDICT DIRECTING INSTRUCTION

During the instruction conference in chambers, Respondent's counsel proffered verdict directing instruction MAI 17.01, 37.01 modified, with a definition of ordinary care 11.07 which comports with Respondent's theory that Appellant discharged Respondent at an unsafe place. (L.F. 1 at 102) That instruction was given by the Court to the jury and reads as follows:

The Instruction was submitted as follows:

Instruction No. 5

In your verdict you must assess a percentage of fault to Defendant Bi-State Development Agency whether or not Plaintiff Bryant Moore, Jr., was partly at fault if you believe:

First, Defendant Bi-State Development Agency failed to discharge Bryant Moore, Jr., in a safe place, and

Second, Defendant Bi-State Development Agency was thereby negligent,

and

Third, such negligence directly caused or directly contributed to cause damage to Bryant Moore, Jr.

The term "negligent" or "negligence" as used in this instruction means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

On cross examination, Appellant's bus driver, Carl Stroughter, stated that putting a passenger off at the location described by Arcadio Aburto would be both inappropriate and dangerous because it was unsafe, particularly because the child would have to cross the oncoming traffic lane to get to a place of safety. (T. 556-558)

POINTS RELIED ON

I. The trial court did not commit error in denying Appellant's Motion for Judgment Notwithstanding the Verdict as Respondent made a submissible case against Appellant because Appellant owed a duty of care to Respondent which continued until Respondent reached a place of safety.

Miskunas v. Chicago Transit Authority, 335 N.E.2d 738, 740 (Ill.App. 1976)

Katamay v. Chicago Transit Authority, 289 N.E.2d 623, 625 (Ill. 1972)

Crutchfield v. Yellow Cab Company, 545 N.E.2d 961, 963 (Ill.App.1 Dist. 1989)

Pharr v. Chicago Transit Authority, 462 N.E.2d 753, 755 (Ill.App.1 Dist. 1984)

II. The trial court did not commit error in denying Appellant's Motion for Judgment Notwithstanding the Verdict because Respondent made a submissible case against Appellant in that Appellant's conduct was the proximate cause of Respondent's injuries.

Watson v. Chicago Transit Authority, 299 N.E.2d 58, 63 (Ill.App. 1973)

Lutz v. Chicago Transit Authority, 183 N.E.2d 579, 582 (Ill.App. 1962)

Roeseke v. Pryor, 504 N.E.2d 927, 932 (Ill.App. 1989)

Pharr v. Chicago Transit Authority, 581 N.E.2d 162, 168 (Ill.App. 1991)

III. The trial court did not commit error in denying Appellant's Motion for New Trial based on alleged juror misconduct due to jury member Marian Shands' failure to disclose three insignificant incidents when questioned about lawsuits and claims, because the questions were unclear, the responses did

not amount to nondisclosure, and the failure to respond was unintentional, non-prejudicial and immaterial.

Alcorn v. Union Pacific RR Company, 50 S.W.3d 226 (Mo.banc 2001)

Keltner v. K-Mart, 42 S.W.3d 716 (Mo.App.E.D. 2001)

Doyle v. Kennedy Heating & Service, Inc., 33 S.W.3d 199 (Mo.App.E.D. 2000)

IV. The trial court's submission of Instruction No. 5, plaintiff's verdict director, was submitted in accordance with the guidelines of Rule 70.02(b) of the Missouri Rules of Civil Procedure; correctly submitting only ultimate issues without hypothesizing argumentative facts and should be upheld.

Rule 70.02(b) Mo. R. of Civ. Pro.

Seitz v. Lemay Bank & Trust Co., 959 S.W.2d 458 (Mo.banc 1998)

Stalcup v. Orthotic & Prosthetic Lab, Inc., 989 S.W.2d 654 (Mo.App.E.D. 1999)

V. **Cross Appeal**

The trial court erred in submitting the contributory/comparative fault of the minor Respondent, Bryant Moore, Jr., to the jury because Appellant Bi-State Development Agency failed to rebut the presumption under Illinois law that children between the ages of 7 and 14 are not capable of contributory/ comparative negligence.

Koonce v. Pacilio, 718 N.E.2d 628 (Ill.App.1 Dist. 1999)

Savage v. Martin, 628 N.E.2d 606 (Ill.App.1 Dist. 1993)

Wright By Wright v. Yellow Cab Co., 451 N.E.2d 1313 (Ill.App.1 Dist. 1983)

ARGUMENT

I.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS RESPONDENT MADE A SUBMISSIBLE CASE AGAINST APPELLANT BECAUSE APPELLANT OWED A DUTY OF CARE TO RESPONDENT WHICH CONTINUED UNTIL RESPONDENT REACHED A PLACE OF SAFETY.

A. Introduction and Standard of Review

The trial court's judgment in Respondent's favor should be affirmed because a submissible case was made against Appellant because as a common carrier, Appellant owed Respondent a duty that continued until he reached a place of safety. As a matter of Illinois substantive law, Appellant's duty owed to Respondent had not terminated at the time of his injury.

1. Choice of Law

Respondent's accident took place in Illinois. His lawsuit was tried in Missouri. Pursuant to Missouri Law governing conflicts analysis, the forum state always applies the forum's procedure. D.L.C. v. Walsh, 908 S.W.2d 791, 794 (Mo.App.W.D. 1995). The forum state's conflicts of law rules determine the applicable substantive law. Id. Consistent with Section 145 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Illinois law governs the substantive legal issues in this appeal. Kennedy v. Dixon, 439 S.W.2d 173,

184 (Mo.banc 1969). Respondent's injury, his domicile, and all events giving rise to this case occurred in Illinois. (L.F. 1 at 30-34).

2. Standard of Review

The appropriate standard of review to be applied to a trial court's ruling is a procedural matter. Therefore, Missouri Law applies. Harter v. Ozark-Kenworth, Inc., 904 S.W.2d 317, 320 (Mo.App.W.D. 1995).

Appellant requests the court to reverse the trial order denying its motion for judgment notwithstanding the verdict. Appellant claims that Respondent failed to make a submissible case against Appellant because Appellant owed Respondent no duty at the time of the accident once Respondent exited the bus. The standard of review of a trial court's denial of a motion for judgment notwithstanding the verdict is whether the plaintiff has made a submissible case. Coggins v. Laclede Gas Co., 37 S.W.3d 335, 338, 339 (Mo.App.E.D. 2000). To make a submissible case, so as to preclude a judgment notwithstanding the verdict, a plaintiff must present substantial evidence for every fact essential to liability. Id. Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide a case. Id. A jury verdict will not be overturned unless there is a complete absence of probative facts to support it. Id. Where reasonable minds can differ on the question before the jury, a court

may not disturb the jury's verdict. Id. Lastly, a judgment notwithstanding the verdict is a drastic action and it should only be granted when reasonable persons could not differ on a correct disposition of the case. Id.

B. A common carrier owes a duty of care to a passenger and that duty continues until the passenger has been given a reasonable opportunity to reach a place of safety.

Under the applicable Illinois substantive law, a common carrier owes the highest degree of care to a passenger and that duty continues until the passenger has been given a reasonable opportunity to reach a place of safety. Miskunas v. Chicago Transit Authority, 355 N.E. 2d 738, 740 (Ill.App. 1976); Katamay v. Chicago Transit Authority, 289 N.E. 2d 623, 625 (Ill. 1972); Crutchfield v. Yellow Cab Company, 545 N.E.2d 961, 963 (Ill.App.1 Dist. 1989); Pharr v. Chicago Transit Authority, 462 N.E. 2d 753, 755 (Ill.App.1 Dist. 1984); and Mitchell v. City of Chicago, 583 N.E.2d 60, 62 (Ill.App.1 Dist. 1991). A passenger, to whom the carrier owes the duty to exercise the highest degree of care, is one who is in the act of boarding, is upon or is in the act of alighting from the carrier's vehicle and to come within that definition, a passenger need not of necessity be in actual contact with the vehicle. Katamay, supra. at 625. Furthermore, the degree of care required to be exercised by the carrier increases as the danger to which the passenger is subjected increases. Katamay, supra. at 625. Finally, it is for the jury to determine whether such a relationship, that of passenger and carrier, existed between the plaintiff and defendant at the time of the accident. Katamay, supra. at 625.

In this case the pre-eminent issue is whether or not Appellant discharged Respondent from its bus at a safe location. Arcadio Aburto was the only eyewitness to this entire event. The evidence showed that on the morning of January 25, 1999, between 6:30 a.m. and 6:30 a.m., it was still dark when Appellant's bus driver, Carl Stroughter, stopped his bus on Caseyville Road. (T. 434, 523). Respondent was a fourteen-year-old high school freshman at Collinsville High School in Collinsville, Illinois. The bus driver, Stroughter, was familiar with Respondent and knew that his destination was the school across Caseyville Road from the drop off. (T. 359, 497, 519, 553, 557). Aburto, who was driving directly behind the Appellant's bus for approximately half a mile, testified that as the bus approached Collinsville High School in the southbound lane of Caseyville Road, it came to a stop entirely in the road about forty-five to fifty feet south of the school service road. (T. 436-440) At this point, Caseyville Road is a two-lane road with a speed limit of forty-five miles per hour with no bus stop, sidewalk, shoulder, or pedestrian crossing marking, and the nearest traffic control device, a boulevard stop, is further south at the intersection of Morrison Road some eight hundred feet away. (T. 440-441, 538, 598) Aburto testified that he was about thirty feet behind the bus and between forty-five to fifty feet south of the school service entrance. (T. 439-440, 600) Aburto testified that Respondent walked on the grass along the side of the bus, then onto the pavement across the back of the bus directly in front of him. Aburto testified that Respondent turned and looked at him while he was sitting in his van, then continued across Caseyville Road at a faster pace. (T. 441-444) Finally, Aburto testified that Respondent was only able to take one and a half steps into the

northbound lane of Caseyville Road when he was struck by a Ford Ranger pickup driven by William Crowell which was traveling northbound on Caseyville Road. (T. 44)

The jury found that when Appellant deposited Respondent on the edge of Caseyville Road Appellant breached the duty it owed Respondent. (L.F. at 111) Respondent never reached a place of safety. The edge of the road where Respondent was put off was not reasonably safe and in fact was unreasonably dangerous, a fact admitted by Appellant's driver. Respondent's young age, the bus driver's knowledge of his need to cross the road, the darkness, the high speed limit, the narrowness of the road, and the lack of illumination on the road all combine to make the discharge location unsafe. These dangerous factors triggered an increase in the degree of care required to be exercised by Appellant. Katamay, supra. at p. 625. Instead the bus driver put Respondent off the bus along the edge of Caseyville Road pursuant to Appellant's policy regarding passenger requested stops, even though that policy did not apply to early morning service. (T. 474-475, 547) Appellant's driver, Carl Stroughter, admitted the discharge was unsafe for the very reasons delineated above. (T. 556-557)

C. Appellant's duty owed to Respondent did not terminate when Respondent left the bus.

Appellant suggests that its duty terminated once Respondent placed two feet on solid ground. The cases cited previously, Katamay, Miskunas, Pharr, Crutchfield and Mitchell state the law of the State of Illinois on this issue. Katamay states:

"The duty of a carrier to its passengers is, not only to exercise the highest degree of care and prudence in carrying them to their destinations, but also to afford them reasonable opportunities to leave the trains of the company with safety. The relation of carrier and passenger does not terminate until the passenger has alighted from the train and left the place where the passengers are discharged, and the duty of the carrier to its passenger continues until the passenger has had a reasonable time in which to leave the depot or alighting place. What is such reasonable time must often depend on the circumstances of the particular case."

(at page 625)

Illinois Law has long held that dropping off a passenger in the middle of a block alongside a lane of moving vehicles which have the right of way is not necessarily a place of safety, Sims v. Chicago Transit Authority, 122 N.E.2d 221, 225 (Ill. 1954). The Illinois Supreme Court further states that it is the carrier's duty not only to exercise a high degree of care while the passenger is upon the train but also to use the highest degree of care and skill reasonably practicable in providing the passenger a safe passage from the train. (Sims, supra. at p. 223)

Appellant cites Crutchfield and Mitchell as support of its position that its duty does not extend to Respondent. Crutchfield and Mitchell present facts which are easily distinguishable from the present case. In Crutchfield, the minor plaintiff was discharged from a bus at a safe location, a designated bus stop. The minor plaintiff was struck by a vehicle while crossing the street only after she left the safe location of the bus stop. In

Mitchell the Plaintiff also was safely discharged at a designated bus stop and was struck after leaving this safe area. In the present case Respondent was put off the bus on the edge of Caseyville Road with no shoulder, and in the dark, even though Appellant's driver knew the "real bus stop" was at the intersection of Caseyville and Morrison. (T. 371-372, 553-554) Here, Respondent was required to leave the unsafe drop off area and make his way across Caseyville Road in order to reach a place of safety. Respondent was never provided with a safe place to alight and he was struck and injured before he reached a place of safety.

Appellant also cites Missouri case law which is not applicable as the substantive law of this case and therefore is not relevant. If Missouri Law did apply, however, RSMo. Sec. 300.510.2 (2000) provides that Appellant owes the Respondent a duty to only discharge passengers at designated stops:

> The operator of a bus shall not stop such vehicle upon any street at any place for the purpose of loading or unloading passengers or their baggage other than at a bus stop, bus stand, or passenger loading loan so designated as provided herein, except in case of an emergency.

The Missouri Supreme Court also has provided in Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291, 307 (Mo.banc 1978) that:

> The carrier is under a duty and obligation to safeguard passengers to select a reasonably safe place to discharge passengers and the carrier is not absolved from this duty merely because the passenger is not injured in the very act of alighting or at the very spot or moment where and when he alighted… (Citations)…

and if the passenger is put off at an unsafe place and is injured in consequence, the negligence of the carrier is considered the proximate cause of the injury.

Appellant is charged with a duty of care until Respondent was given a reasonable opportunity to reach a place of safety. Whether or not Appellant fulfilled its duty to Respondent is a factual determination for a jury to decide. Katamay, supra. at p. 626. That factual determination was submitted to and decided by the jury with its verdict. (L.F. at 103) Respondent submitted sufficient evidence to submit the case to the jury under its existing duty of care to discharge the Respondent at a safe place, and the trial court was correct in overruling Appellant's Motion for Judgment Notwithstanding the verdict. Point I should be denied.

II

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE RESPONDENT MADE A SUBMISSIBLE CASE AGAINST APPELLANT IN THAT APPELLANT'S CONDUCT WAS THE PROXIMATE CAUSE OF RESPONDENT'S INJURIES.

A. Introduction

The trial court's judgment in Respondent's favor should be affirmed because Appellant's breach of its duty owed to Respondent caused Respondent's injuries. The causal connection is unbroken between Appellant's discharge of Respondent at an unsafe place and Respondent's injury, which was probable and foreseeable.

The standard of review for this point is the same as the standard for point one, therefore, it will not be repeated here.

B. Proximate cause can be established when it is reasonably certain the defendant's breach of a duty owed caused the injury.

In a negligence action, the plaintiff must prove that the defendant owed a duty of care to the plaintiff, that defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injury. Wiegman v. Hitch-Inn Post of Libertyville, 721 N.E.2d 614, 620 (Ill.App.2 Dist. 1999). Further, causation may be established by facts and circumstances which in the light of ordinary experience reasonably suggest the defendant's negligence operated to produce the injury. Wiegman, supra. at 620. Lastly, a proximate cause is one that produces injury through a natural and continuous sequence of events unbroken by any effective intervening cause. Estate of Elfayer, 757 N.E.2d 581, 587 (Ill.App.1 Dist. 2001).

As admitted by Appellant, Bi-State owed Respondent, as Bi-State's passenger, a duty to discharge Respondent, as its passenger, at a place of safety. (Brief of Appellant, pg. 41) Appellant breached this duty by discharging Respondent not at a bus stop, intersection or crosswalk but on the edge of Caseyville Road. The edge of the road where Respondent was put off of the bus was not reasonably safe and, in fact, was unreasonably dangerous, facts admitted by Appellant's driver, Carl Stroughter. (T. 556-558) Respondent's young age, the driver's knowledge of Respondent's need to cross the road, the darkness, the high speed limit, the narrowness of the road, and the lack of illumination on the road all combined to

make the discharge location unsafe and unreasonably dangerous. In order to reach a place of safety Respondent had to leave this unsafe drop off point, whereupon he was struck and seriously injured by a northbound truck.

For there to be a causal connection, the negligence of the carrier need not be the only cause, nor the last or nearest cause of the passenger's injury. It is sufficient if the negligence concurs with some other cause acting at the same time, which in combination with it causes the injury. Lutz v. Chicago Transit Authority, 183 N.E.2d 579, 581 (Ill.App.1962). In other words, if a passenger, is put off at an unsafe place and is injured in consequence, the negligence of the carrier is considered the proximate cause of the injury.

As previously discussed, the substantive law of Illinois controls here. However, Graeff, supra. at 307 is instructive. In Graeff the carrier discharged a child at an unsafe location knowing full well that the child had to cross the street to reach a point of safety. Like here, he was struck while trying to cross the street. In summarizing the carrier's duty the court stated, "The carrier is under a duty and obligation to safeguard passengers to select a reasonably safe place to discharge passengers and the carrier is not absolved from this duty merely because the passenger is not injured in the very act of alighting or at the very spot or moment where or when he alighted. (citations omitted) And if the passenger is put off at an unsafe place and is injured in consequence, the negligence of the carrier is considered the proximate cause of the injury. (citations omitted)"

C. Appellant's breach of its duty to Respondent proximately caused Respondent's injuries.

Under the applicable Illinois substantive law questions of proximate cause are customarily questions of fact for a jury to decide. Watson v. Chicago Transit Authority, 299 N.E.2d 58, 63 (Ill.App. 1973); Pharr v. Chicago Transit Authority, 581 N.E.2d 162, 168 (Ill.App. 1991). In Watson the court held that the carrier could be liable for common law negligence for stopping an unreasonable distance from the curb, which caused the plaintiff to be struck by a car. Watson, supra. at 63. Furthermore, for there to be a causal connection, a carrier's negligence does not have to be the only cause, nor the last or nearest cause of the passenger's injury. It is sufficient if the carrier's negligence concurs with some other cause acting at the same time, which in combination with it causes the injury. Watson, supra. at 63; Lutz, supra. at 581.

In this case, the jury was asked to decide whether or not Appellant discharged Respondent from its bus at a safe place. The sequence of events began when Appellant deposited Respondent, a 14 year old, along the edge of Caseyville Road. It was dark on that January 25, 1999 morning between 6:20 a.m. and 6:30 a.m. when Appellant's bus driver, Carl Stroughter, stopped his bus. (T. 434, 523) Appellant's bus driver, Carl Stroughter, was familiar with Respondent and knew that his destination was the school across Caseyville Road from the put off point. (T. 359, 497, 519, 553, 557). According to Arcadio Aburto, the only eyewitness, who was driving directly behind the Appellant's bus for approximately half a mile, as the bus approached Collinsville High School in the southbound lane of

Caseyville Road it came to a stop entirely in the road about 45-50 feet south of the school service road. (T 436-440; See also Exhibits 16 and 20) At this point, Caseyville Road is a narrow two-lane road with a speed limit of 45 miles per hour with no bus stop, sidewalk, shoulder or pedestrian crossing marking, and the nearest traffic control device is further south at the intersection of Morrison Road some 800 feet away. (T. 440-441, 538, 598) Aburto testified that he was about 30 feet behind the bus and the bus was between 45 and 50 feet south of the school service road. (T 439-440, 600) Aburto testified that Respondent walked on the grass along the side of the bus, and then onto the pavement across the back of the bus directly in front of him. At this point Aburto stated that Respondent turned and looked at him as he was sitting in his van, then continued to cross Caseyville Road at a faster pace. (T 441-444) Finally, Aburto testified that Respondent was only able to take one and a half steps into the northbound lane of Caseyville Road when he was struck by a Ford Ranger pickup driven by William Crowell, which was traveling northbound on Caseyville Road. (T. 445)

The collision of the truck with Respondent was not a subsequent independent act which broke the causal connection between Appellant's unsafe discharge and Respondent's injury. Appellant's unsafe discharge did not constitute a condition such as a poorly maintained road median barrier as in Elfayer, supra. a case relied on by Appellant. Rather, this tragic accident was a reasonably foreseeable consequence of Appellant's original negligent act given Respondent's young age, the driver's knowledge of his need to cross the

road, the darkness, the high speed limit, the narrowness of the road and the lack of illumination on the road, which combined to make the discharge location unsafe.

As discussed more fully in Point I above, neither Crutchfield or Mitchell supports Appellant. This is because there was no dispute in these cases that the passenger was dropped off at a safe location, the precise issue that is in dispute here. Likewise, Arbogast v. Fedorchak, 194 N.E.2d 382, 386 (Ill.App. 1963) does not support Appellant's contentions here. This is because in Arbogast the only negligence charged to the defendant carrier was blocking a crosswalk in violation of city and state law and there was no evidence that plaintiff ever attempted to use the crosswalk. In short, there was no dispute in Arbogast that the plaintiff, after at first getting on the bus then got off the bus at a safe location.

Illinois courts have addressed the scenario involving the subsequent act of a third party and held that the subsequent act of a third party does not break the causal connection between a defendant's negligence and plaintiff's injury where the subsequent act was probable and foreseeable. Roeseke v. Pryor, 504 N.E.2d 927, 932 (Ill.App. 1987). See also: Lutz, supra. (negligence of fellow passenger in pushing a passenger did not absolve carrier from its negligence in permitting bus to become dangerously overcrowded).

In Roeseke, the plaintiff's initial negligence set the stage for a multiple vehicle pile up that followed. The court held that in order to escape liability, a defendant must demonstrate that the third party's act was unforeseeable as a matter of law. Id. Here, Appellant proffered no evidence that the collision of the northbound pickup with Respondent was unforeseeable as a matter of law. In fact, Appellant's bus driver, Carl

Stroughter, categorically stated that putting a passenger off at the location described by Aburto would be both inappropriate and dangerous because it was unsafe, particularly because the child would have to cross the oncoming traffic to get to a place of safety. (T. 556-558) This unsafe place is exactly where Stroughter put the minor Respondent off the bus.

The jury was entitled to believe the only eyewitness', Aburto's, account of what transpired the day of this tragic accident. Moreover, it is undisputed that it is within the jury's province to resolve conflicts in the evidence. As long as the jury's resolution is supported by credible evidence, as is the case here, then a reviewing court should not substitute its judgment for the jury's.

III.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON ALLEGED JUROR MISCONDUCT DUE TO JURY MEMBER MARIAN SHANDS' FAILURE TO DISCLOSE THREE INSIGNIFICANT INCIDENTS WHEN QUESTIONED ABOUT LAWSUITS AND CLAIMS, BECAUSE THE QUESTIONS WERE UNCLEAR, THE RESPONSES DID NOT AMOUNT TO NONDISCLOSURE, AND THE FAILURE TO RESPOND WAS UNINTENTIONAL, NON-PREJUDICIAL AND IMMATERIAL.

Appellant suggests that it is entitled to a new trial on all issues due to the nondisclosure of three minor complaints made previously to Appellant by juror Marian Shands. Juror Shands testified at a post trial hearing that she did not feel that these

incidents rose to the level of claims (T. 734). Ms. Shands also testified that she disclosed what she remembered at the time she was questioned on voir dire (T. 744). The trial court found after this hearing that Ms. Shands' nondisclosure was unintentional and denied Appellant's Motion for New Trial on that issue (L.F. 195). In order to reverse the trial court's order on the issue of juror misconduct Appellant must show the trial court abused its discretion. Alcorn v. Union Pacific RR Company, 50 S.W.3d 226, 246 (Mo.banc 2001) A trial court's findings in ruling on a Motion for New Trial based on juror misconduct are given great weight and will not be disturbed on appeal, absent an abuse of discretion, Alcorn, supra. at p. 246, see also Brines v. Cibis, 882 S.W.2d 138 (Mo.banc 1994). An examination of the questions presented to Ms. Shands at voir dire, her responses to those questions, and her attendance and responses at the post trial motion clearly show that the trial court did not abuse its discretion in denying Appellant's Motion for New Trial on this issue.

In refusing to order a new trial the trial court properly exercised its discretion in determining that any concealment by Ms. Shands was unintentional (L.F. 200). Consistent with Alcorn and Brines, the trial court's findings are given great weight and should not be disturbed on appeal.

A. THE QUESTIONS WERE UNCLEAR.

The case of Keltner v. K-Mart, 42 S.W.3d 716 (Mo.App.E.D. 2001) is a recent pronouncement by this court on the issue of overturning jury verdicts due to juror nondisclosure. According to Keltner the Supreme Court of Missouri has consistently made clear that a finding of nondisclosure requires this preliminary determination: Was the

question clear? Keltner, supra. at p. 722. It is well settled that the Missouri Supreme Court holds that nondisclosure can occur only after a clear question on voir dire unequivocally triggers a venireperson's duty to respond, Keltner at p. 723, citing Wingate by Carlisle v. Lester E. Cox Medical Center, 853 S.W.2d 912, 916 (Mo.banc 1993). Only after the court has determined that the question is clear does it proceed to the issue of whether or not the alleged nondisclosure was indeed a nondisclosure and finally whether or not it was intentional or unintentional, McHaffie v. Bunch, 891 S.W.2d 822, 829 (Mo.banc 1995).

The focus of Appellant's Point III is based on its own interpretation that Marian Shands failed to respond to clear questions requesting information on past claims. Consistent with Keltner, supra. at page 722, prior to determining whether the nondisclosure was indeed a nondisclosure, intentional or unintentional, the clarity of the questions and their import on this prospective juror must be examined. Without prompting from any question regarding claims or lawsuits, Ms. Shands first responded on voir dire that she had a claim against Bi-State some years before involving an accident on Whittier and Finley resulting in significant injuries (T. 73). Later, the entire panel was asked if anyone had ever been a party to a lawsuit, wherein Ms. Shands replied again regarding the previously divulged Bi-State incident but also included two Workers' Compensation claims against the City of St. Louis (T. 147). Further general questions from Respondent's counsel requested a response to whether or not any juror was a party to a lawsuit (T. 161), to which there was no response from Ms. Shands. Later, Respondent's counsel requested information on claims, clearly disregarding those jurors who had already offered this information (T. 163):

"MR. WARNER: He anticipated my next question. My next question--**I know some of you already told me some of this information**--have you ever been involved in a situation where you have had to make a claim for a personal injury or something else, or somebody has made a claim against you that didn't get all the way to be a lawsuit? It was just a claim? They were claiming that you had caused an accident or what have you?" (Emphasis added.)

Voir dire questions from Appellant's counsel to the entire panel followed and requested whether any member of a prospective juror's family or themselves were ever injured getting on or off a bus (T. 226) or were a Plaintiff in a lawsuit (T. 231). Appellant's counsel directly asked Ms. Shands whether she presently had a claim against Bi-State to which she responded "no that was in the past" (T. 233). Appellant's counsel again requested whether or not any prospective juror was a Plaintiff in a lawsuit for personal injuries to which no reply from Ms. Shands was given (T. 234). Appellant's counsel later requested whether or not any juror had thought of any claim "where you were asking for money damages but you made a claim against somebody for injuries that you sustained that you haven't told us about" (T. 239, 240). No one responded to this question. Clearly Appellant's counsel's questions narrowed the focus of the questions thereby limiting responses to present claims or lawsuits in which a juror was asking for money damages.

Ms. Shands was called to testify at a post trial hearing on July 10, 2001 (T. 714-748). Ms. Shands answered questions posed by Appellant's counsel stating first that she had never been injured boarding or unboarding a bus (T. 727). She further testified that there

were no responses given to the questions concerning claims because "there were none" (T. 729). Ms. Shands emphatically stated, "I never filed a claim." (T. 730). The questions upon which Appellant relies as clear questions strong enough to trigger a response, clearly suggest responses to a juror's participation in lawsuits or claims in which money was requested or claims were actually filed. Ms. Shands explained at the post trial hearing that she did not make claims on any of the three incidents suggested by the Appellant (T. 730, 732, 740). Ms. Shands further testified that "I called and notified them, no action was ever taken." (T. 731). Ms. Shands was, however, contacted by Appellant in regard to complaints which she had registered, which had not risen to the level of claims (T. 740). Certainly, courts will not permit attorneys to take advantage of their own or their opponent's ambiguous questions to impeach a verdict they dislike. Keltner, supra. at p. 723. Counsel's questions were not clear enough to require a response about complaints made if they had not demanded money or not actually filed a claim. Ms. Shands emphatically stated that she never filed a claim for these incidents but indicated that she called and notified Bi-State but "never filed a claim" (T. 730, 731). Ms. Shands stated that neither the 1994 incident nor the 1997 incident amounted to claims (T. 730, 732).

Appellant's counsel also oriented Ms. Shands to a May 13, 1999, incident where she became sick on a bus due to excessive fumes, to which she also did not bring or file any type of claim (T. 740). In response to this complaint an adjuster from Bi-State appeared at Ms. Shands' office and paid her $150.00, before she ever made any claim or demand for money. Similarly Appellant's adjuster offered Ms. Shands fifty dollars without any claim or

request for money for a July 5, 1994 incident. It is obvious that Ms. Shands attempted to be honest and complete with her answers to the questions which were presented to her on voir dire. Ms. Shands honestly felt that she had not made claims for any of the three minor incidents which Appellant accuses her of having concealed. Ms. Shands testified at the post trial hearing as follows (T. 747):

> "You can consider it a claim if you want to. I called them to report it for the betterment of services for the citizens of St. Louis, and they made me an offer. It's not as though I said pay me for this or pay me for that."

The questions asked by counsel did not unequivocally trigger Ms. Shands' duty to respond and Appellant's reliance on those questions falls short of the requirements of Keltner.

Appellant was free to inquire at voir dire about occurrences and complaints made by any prospective juror which did not rise to claim level, but failed to do so. Certainly, Appellant is in a superior position to know of its claim avoidance process and could have tailored its voir dire questions accordingly in order to make them clear. Appellant simply is requesting reversal for a result which it dislikes following inartfully drafted questions, clearly contrary to the Keltner holding. Ms. Shands attempted to answer the questions as honestly as she could, as she testified that she was neither making claims nor requesting money when the adjuster appeared and offered her money. Ms. Shands answered all questions which unequivocally triggered a duty for her to respond. Ms. Shands testified she did not make claims on these three insignificant incidents, and that Appellant's adjuster

appeared and simply paid her to obtain a release (T. 747). Ms. Shands was never a Plaintiff in a lawsuit other than the suit which she disclosed, nor was she injured boarding or unboarding a bus (T. 727). Ms. Shands' responses clearly show that she did not believe the three incidents complained of were claims. Appellant had ample opportunity to specifically ask about its process of preventing claims by offering payments before claims were made but failed to do so. Had Appellant asked these questions then a duty for Ms. Shands to respond may have arisen. The questions asked, however, were not clear enough to unequivocally trigger a duty to respond.

B. THE RESPONSES DID NOT AMOUNT TO NONDISCLOSURE.

If the court determines that the questioning was clear enough to trigger a duty to respond, the issue of nondisclosure is determined next. When a question unequivocally triggers a prospective juror's duty to disclose, silence establishes nondisclosure. Keltner, at p. 723. Certainly, Ms. Shands disclosed information regarding claims when she felt it was being requested. Ms. Shands volunteered information about a claim involving an accident involving a Bi-State bus before she was even asked about claims (T. 73). Ms. Shands also volunteered information about two Workers' Compensation claims when she was asked about claims (T. 147). Appellant's reliance on the three incidents to which Ms. Shands did not respond is misplaced due to their insignificant nature. One incident terminated without any payment, and the others involved minimal payments of $50 and $150 each. These three incidents did not rise to the level of claims in Ms. Shands' mind and therefore did not trigger a duty for her to respond to questions about claims. These

minor occurrences, which Ms. Shands stated several times that she had forgotten (T. 744, 746), therefore do not rise to the level of nondisclosure especially given the lack of clear questioning as previously discussed. Ms. Shands believed that she had answered all questions related to claims she had made or filed and that the three minor occurrences were indeed not claims. Ms. Shands stated several times when questioned about claims "Because there is none" (T. 728), "Because there aren't any" (T. 729); "there were none" (T. 729); "I never filed a claim." (T. 730); and "I called and notified them, action was never taken." (T. 731). When questioned further about the 4/5/97 incident, Ms. Shands responded, "I never made a claim. I reported it. I never made a claim." (T. 733). When asked if she requested a settlement for the occurrence, Ms. Shands responded "No, I did not." (T. 735). She further stated, "I never filed one." (T. 743), and "You can consider it a claim if you want to. I called them to report it for the betterment of services for the citizens of the City of St. Louis, and they made an offer. It's not as though I said pay me for this or pay me for that." (T. 747). Ms. Shands' testimony regarding whether or not she believed these occurrences were claims is believable and plausible. Ms. Shands therefore disclosed all claims which the questions asked of her, and therefore her silence does not qualify as nondisclosure.

C. IF THE FAILURE TO ANSWER AMOUNTS TO NONDISCLOSURE SUCH NONDISCLOSURE WAS NOT INTENTIONAL.

In the event that the court determines that the questions were clear and Ms. Shands' failure to answer amounted to nondisclosure, it is clear that any nondisclosure was unintentional. After the post trial hearing Judge Edwards issued his order that this case

does not involve intentional nondisclosure (L.F. 200). This finding should be given great weight and not be disturbed on appeal, Alcorn, supra. at p. 246. The standard to determine between intentional and unintentional nondisclosure is defined in Williams v. Barnes Hospital, 736 S.W.2d 33 (Mo.banc 1987):

> "Intentional nondisclosure occurs:
>
> 1. Where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and,
>
> 2. Where it develops that the prospective juror actually remembers the experience, or that it was of such significance that its purported forgetfulness is unreasonable.
>
> Unintentional nondisclosure exists where for example the experience forgotten was insignificant or remote in time or where the venireman reasonably misunderstands the question posed."

Clearly there was no intentional nondisclosure on the part of Ms. Shands. Ms. Shands did not remember the incidents and stated so (T. 744, 746). Ms. Shands also stated, "I disclosed what I remembered at the time." (T. 744). Ms. Shands stated that she only recalled those minor instances after prodding by counsel at the July 10, 2001 hearing (T. 746). The determination of intentional or unintentional nondisclosure is left to the trial judge whose ruling will only be disturbed by showing an abuse of discretion, Wingate, supra. at p. 917, see also Rogers v. Bond, 880 S.W.2d 607, 610 (Mo.App.E.D. 1994).

In all cases involving an alleged nondisclosure of information by jurors the court applies a three pronged test. First, was the nondisclosure intentional or unintentional; second, if the nondisclosure was intentional was it material; third, if the nondisclosure was not material movant must show actual prejudice. Brines, supra. at p. 140. Marian Shands' testimony made it clear that if there was a nondisclosure, it was not intentional for she had forgotten the three insignificant occurrences, and no question was asked about this type of occurrence requiring a duty to respond.

Ms. Shands' first statement during voir dire occurred when she volunteered that she had a previous claim against Appellant in response to a question that was not asking about claims, only whether or not any prospective juror knew any of the parties or attorneys involved in the lawsuit (T. 73). Further, Ms. Shands testified at the hearing on the post trial motions that she did not consider the three minor incidents complained of by the Appellant as claims, because she was not asking for money (T. 747). Ms. Shands considered these three occurrences to simply be reports that she made to Appellant in which Appellant voluntarily offered her money on two of the three in order to avoid claims. In these two instances Appellant sought out Ms. Shands at her place of employment, and offered her $150.00 and $50.00 without the necessity of her bringing a claim or requesting any monetary settlement. The third occurrence involved the report of a fall, and Ms. Shands neither brought a claim nor requested money. Appellant therefore voluntarily offered Ms. Shands a nominal amount of money in response to her reported complaints so that they would not become claims. Appellant now attempts to use this procedure which it created to

mislabel reports of incidents as claims. Appellants' Point III requests a new trial by stating that the three reported incidents constitute an intentional non-disclosure, however, Ms. Shands testified that she did not consider these three reported incidents to be claims and further testified that she disclosed what she remembered at the time (T. 744).

In its Order of August 9, 2001, denying Appellant's Motion for New Trial the court found:

> "The court finds that the record does not support a finding that this is a case involving intentional nondisclosure that warrants the granting of a new trial." (L.F. 200)

The court also found that Ms. Shands testified that defense counsel is "bringing up things that I have even forgotten" (L.F. 201, T. 744) and with regard to the three incidents she further stated that "I disclosed what I remembered at the time" (T. 744). Appellant suggests in its Brief that Ms. Shands' failure to respond regarding the three incidents amounts to intentional and material nondisclosure, citing Williams and Brines. Williams and Brines, however, concern specific fact situations which do not apply to the present case. In Brines a juror had been sued eight times within the six years prior to trial and failed to disclose that. In Williams a $1,500.00 personal injury settlement several years before trial was found by the court to be significant enough to compel disclosure.

In the case at bar these three occurrences were insignificant events occurring over the previous seven years, which were so minor that Ms. Shands had forgotten them, and in her mind were not actually claims. Also, Appellant urges the court to set aside the verdict

because Ms. Shands failed to mention that she settled her 1990 claim against a third party, when in fact that question was never asked by either counsel. Information was not withheld intentionally and reasonable explanations exist as to why Ms. Shands did not reply to these questions. The nondisclosures were unintentional, and the trial court's judgment should not be disturbed.

D. IF THERE WAS NONDISCLOSURE IT WAS NEITHER MATERIAL NOR PREJUDICIAL.

Appellant suggest that the Williams case requires reversal because the nondisclosure complained of was material and prejudicial. Appellant fails, however, to offer any evidence of prejudice and the three incidents complained of were insignificant and obviously unintentional. Ms. Shands did not sign the verdict and therefore did not participate in determining the verdict or its value (See Judgment, L.F. 111) (T. 717). At the post trial motion over objection, Appellant's counsel attempted to question Ms. Shands about her participation in the jury deliberation (T. 718). These questions should not be considered because any questions suggesting why Ms. Shands did not sign the verdict or what verdict she would have returned amount to an improper attempt by the Appellant to impeach the verdict in the case. See McCormack v. Capital Electric Construction Company, 35 S.W.3d 410 (Mo.App.W.D. 2000); Wingate, supra. at p. 916. Since Ms. Shands did not sign the verdict, the verdict complained of was not hers and therefore any unintentional or forgotten nondisclosure should not serve as any basis for granting a new trial to the Appellant because there was no prejudice. The party alleging prejudice bears the burden of proving that any

nondisclosure may have influenced the verdict. Aliff v. Cody, 987 S.W.2d 439, 444 (Mo.App.W.D. 1999) No prejudice could be caused to Appellant as a result of these minor, insignificant complaints brought by Ms. Shands which had not amounted to claims, especially since she did not participate in the verdict. In addition, Appellant was already aware of a claim involving serious injuries which Ms. Shands did pursue. Also, Ms. Shands testified clearly that these reported incidents did not affect her ability to judge the case fairly (T. 747). Appellant is attempting to set aside a verdict of which it is unhappy for reasons which do not rise to the level of prejudice, are immaterial and insignificant.

E. THE APPELLANT ATTEMPTS TO SET ASIDE THE VERDICT BASED ON JUROR MISCONDUCT WHEN IT COULD HAVE RECEIVED JUROR INFORMATION DURING TRIAL AND REPLACED THE JUROR WITH AN ALTERNATE.

In Doyle v. Kennedy Heating and Service, Inc., 33 S.W.3d 199, 201 (Mo.App.E.D. 2000) this court stated that filing a Motion for New Trial based on juror misconduct is not favored, "especially when the lawyers could have prevented this by bringing forth their allegations prior to jury deliberation, so that the jurors involved could be replaced with alternates. It does not make sense, with respect to judicial economy, to wait until after trial, to bring allegations of juror intentional nondisclosure of material information."

The Doyle court also noted that, "it appears this is becoming strategy for sandbagging by losing parties. We strongly encourage parties who have information about possible allegations of juror intentional nondisclosure prior to jury deliberation to bring it

forth before the case is given to the jury." Doyle at p. 201, 202. Contrary to Doyle, Appellant is attempting to attack the verdict when it could have received the information on these three occurrences during trial, and at that time requested replacement of the juror with an alternate. Appellant's claims supervisor, Lori Francin, testified at the hearing on the post trial motions (T. 749-753). Ms. Francin testified that Appellant has in place a computer system called the "DAVID System" that keeps track of all individuals who have ever made any type of incident report or claim to Appellant (T. 751). More importantly, Ms. Francin testified that if an individual's name is placed into the system that a response would immediately occur on whether or not that person had ever made any claims or incident reports against Appellant (T. 752-753). Ms. Francin testified that Appellant did not perform any instantaneous check of the DAVID System during the trial, only after the verdict (T. 753). Appellant obviously chose to wait until after a jury verdict of which they were not satisfied to use the "DAVID System", and then run their attack on the verdict. Appellant had ample opportunity to run all of the jurors' names through the "DAVID System" before jury deliberation began as jury selection commenced Monday, April 23, 2001, and jury deliberations did not begin until 11:23 a.m. on Thursday, April 26, 2001 (T. 678). In summary, even if it is assumed that there was nondisclosure by juror Marian Shands, Appellant's inaction in not running the jurors including Marian Shands through their "DAVID System" amounts to a waiver under the Doyle case of any right to a new trial.

IV.

THE TRIAL COURT'S SUBMISSION OF INSTRUCTION #5, PLAINTIFF'S VERDICT DIRECTOR, WAS SUBMITTED IN ACCORDANCE WITH THE GUIDELINES OF RULE 70.02(b) OF THE MISSOURI RULES OF CIVIL PROCEDURE; CORRECTLY SUBMITTING ONLY ULTIMATE ISSUES WITHOUT HYPOTHESIZING ARGUMENTATIVE FACTS AND SHOULD BE UPHELD.

Appellant requests the court to reverse the trial court's judgment and order a new trial because it claims Instruction No. 5 was erroneous. Appellant's claim of error centers on paragraph first of Instruction No. 5 which states that Appellant failed to discharge the Plaintiff in a safe place. Appellant further alleges that Instruction No. 5 was required to specify in what manner the place of discharge was unsafe by including in the instruction the many factors which made this particular stop unsafe.

The Instruction was submitted as follows:

Instruction No. 5

In your verdict you must assess a percentage of fault to Defendant Bi-State Development Agency whether or not Plaintiff Bryant Moore, Jr., was partly at fault if you believe:

First, Defendant Bi-State Development Agency failed to discharge Bryant Moore, Jr., in a safe place, and

Second, Defendant Bi-State Development Agency was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to Bryant Moore, Jr.

The term "negligent" or "negligence" as used in this instruction means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction No. 5 was an "MAI modified" instruction and was submitted precisely according to the mandate of Rule 70.02(b), Missouri Rules of Civil Procedure, by submitting only ultimate issues without submitting or requiring findings of detailed evidentiary facts. Rule 70.02(b) of the Missouri Rules of Civil Procedure provides as follows:

Rule 70.02(b) Form of Instructions. Whenever Missouri approved instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject. Where an MAI must be modified to fairly submit the issues in a particular case or where there was no applicable MAI so that an instruction not in MAI must be given, **then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts**. (Emphasis added.)

Paragraph First of Instruction No. 5 states that Appellant Bi-State Development Agency failed to discharge Bryant Moore, Jr. in a safe place. Appellant claims that this paragraph

provides a roving commission which allows the jury to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability. The instruction as given does not cause a roving commission and clearly follows the requirements of Rule 70.02(b) which states that requiring findings of detailed evidentiary facts is not necessary and indeed prohibited in "MAI Modified" instructions. Appellant claims error, however, because the instruction fails to require specific evidentiary findings, but Rule 70.02(b) requires that a proper instruction submits to the jury only ultimate issues and not evidentiary details. This requirement is done to avoid undue emphasis of certain evidence, confusion, and favoring one party over another. Sheinbein v. First Boston Corporation, 670 S.W.2d 872, 878 (Mo.App.E.D. 1984).

The Missouri Supreme Court examined a similar instruction in Seitz v. Lemay Bank & Trust Company, 959 S.W.2d 458 (Mo.banc 1998). In an instruction which submitted a negligent bailment issue, the Appellant objected to language which stated as follows: "Second, Defendant failed to move or cause those instruments to be moved to a safe place…". The Supreme Court in Seitz defined the ultimate issue as whether or not moving the bailed instruments was consistent with ordinary care in the custody, preservation and care of the instruments. The Seitz Opinion stated that the instruction properly presented the jury with the ultimate issue: "whether or not the bank exercised ordinary care in not moving the contents of the vault to a safe place", Seitz at page 463. The Seitz Court found that the instruction given was not misdirecting, misleading or confusing and affirmed the trial court's submission of this instruction.

As in Seitz the present instruction only hypothesizes the ultimate issue, whether Appellant failed to discharge the Plaintiff in a safe place, and whether or not Appellant was thereby negligent in doing so. As in Seitz, this language is not misdirecting, misleading, or confusing. The test for permitting an instruction that is not in MAI is whether or not it follows the applicable substantive law and can be readily understood by the jury. Brown v. Van Noy, 879 S.W.2d 667 (Mo.App.W.D. 1994) A "Not in MAI" or an "MAI modified" instruction should submit only ultimate facts, but is not to submit mere evidentiary facts, Brown, supra. at p. 672. Appellant's argument requests the addition of unnecessary evidentiary facts which clearly violate Rule 70.02(b).

Appellant cites the court to several cases with inapplicable facts regarding instructions which have no relevance to the present case. Each case cited by Appellant is easily distinguished from the present case. Two of the cases relied upon by Appellant, (Ricketts and Enloe discussed later), involve property maintenance liability fact situations. In these fact situations MAI requires that the dangerous condition which causes injury to be set out. These maintenance of property submissions require an MAI Chapter 21 pattern instruction as their basis. Instructions contained in Chapter 21 of MAI differ in this way from the Chapter 17 pattern instructions which submit negligent act claims, like the present case. Instruction No. 5 charges negligence for the Defendant's failure to discharge the Plaintiff in a safe place, a single negligent act, not the Defendant's maintenance of property. That failure to act with ordinary care constitutes the alleged negligence; not the defendant's maintenance of specific dangerous characteristics of any property.

Appellant cites Ricketts v. Kansas City Stockyards Company of Maine, 484 S.W.2d 216 (Mo.banc 1972). The Ricketts Court reversed an instruction as too broad and indefinite because it submitted only that Defendant "failed to provide reasonably safe conditions for work" in Paragraph First of its Verdict Director. The Ricketts' instruction was held erroneous because of a general lack of specificity of the condition of the premises. The Defendant in Ricketts was charged with a duty to maintain a piece of property and not charged with active negligence. In the present case Appellant actively discharged the Plaintiff on a portion of road without a shoulder, in the dark, which required him to cross a two lane highway exhibiting a speed limit of 45 miles per hour in order to reach a place of safety. The jury was requested by Instruction No. 5 to determine whether or not Appellant's act of discharging the Plaintiff in this spot violated ordinary care, therefore submitting the ultimate issue in clear simple terms. Adding detailed evidentiary facts as suggested by Appellant would violate the requirements of Rule 70.02(b) and those cases construing it. A similar instruction charging a defendant with violating an active duty of care was approved in the Seitz case, supra. In Seitz the court found that the negligence hypothesized, "failing to move or cause the instruments to be moved to a safe place", was sufficient to state the ultimate issue for the jury to determine whether or not the act of failing to move the instruments was negligent. The Seitz jury was therefore not requested to determine any issues regarding the Defendant's maintenance of the condition of the property. Instruction No. 5, here, similarly states only the ultimate issue.

Appellant also cites Enloe v. Pittsburgh Plate Glass Company, 427 S.W.2d 519 (Mo. 1968). The Enloe case decided that an instruction was erroneous because it failed to require the jury to find that a condition itself was defective and that the defective condition caused a forklift to be not reasonably safe. As in Ricketts, Enloe requests the finding of a defective condition of property. Liability based on the maintenance of defective property such as Enloe and Ricketts are required by Chapter 21 of MAI to require a finding of a defective condition followed by a finding that the defect caused it to be unsafe. The present case is different. The present case requires only a finding of whether or not an affirmative negligent act of discharging a passenger at one particular place violated ordinary care, and did not require a finding that Defendant was negligent in maintaining that site. MAI Chapter 17 negligent act cases do not require any finding of a defective condition before finding negligence. Appellant's action created the dangerous condition by actively discharging Respondent at an unsafe place. Rule 70.02(b) requires that the pattern Chapter 17 instruction not hypothesize all particular facts, only requesting a finding of the ultimate issue, which does not require a finding that the area was maintained defectively.

The third case Appellant cites to the court is Douglas v. Hoeh, 595 S.W.2d 434 (Mo.App.E.D. 1980). The Douglas instruction was reversed because it did not appropriately state all the elements which set out the law which the jury was required to determine. The instruction in Douglas was improper because it failed to state that a summons was not served in a proper manner which was a necessary element of the cause of action. Therefore, the jury in Douglas could find liability from this instruction without first being required to

find the return was false. A proper return could still lead to liability. In the present case all elements of the claim which were required to be submitted were submitted in simple, brief, impartial and free from argument form as required by Rule 70.02(b). A jury instruction that is "Not in MAI" is reviewed to determine whether the jury could understand the instruction and whether the instruction followed applicable substantive law by submitting the ultimate facts required to sustain a verdict. Stalcup v. Orthotic & Prosthetic Lab, Inc., 989 S.W.2d 654 (Mo.App.E.D. 1999). To reverse a jury verdict on grounds of instructional error Appellant must show that "1. The instruction as submitted misled, misdirected or confused the jury, and (2) prejudice resulted from the instruction." Volkenburgh v. McBride, 2 S.W.3d 814, (Mo.App.W.D. 1999). Clearly, in the present case the instruction was neither misleading, misdirecting, or confusing and unlike Douglas did not assume an element of the cause of action by failing to require the jury to find a necessary element of the cause of action. Appellant offers no argument suggesting prejudice from Instruction No. 5.

Appellant's brief essentially requests the court to reject Instruction No. 5 because it provided insufficient guidance to the jury. Precisely to the contrary, Instruction No. 5 was drawn exactly in accord with Rule 70.02(b) of the Missouri Rules of Civil Procedure and the cases construing it. A proper instruction submits to the jury only ultimate issues not evidentiary details. This type of submission is done to avoid undue emphasis of certain evidence, confusion and favoring one party over another, Scheinbein, supra. at 878. The concept of a roving commission raised by the Appellant is inapplicable to Instruction No. 5 because this instruction submitted all elements of the cause of action. Instruction No. 5

was concise, simple, brief, impartial, free from argument and did not require the findings of detailed evidentiary facts. Appellant's Point IV should be denied.

V.

CROSS APPEAL

THE TRIAL COURT ERRED IN SUBMITTING THE CONTRIBUTORY/ COMPARATIVE FAULT OF THE MINOR RESPONDENT, BRYANT MOORE, JR., TO THE JURY BECAUSE APPELLANT BI-STATE DEVELOPMENT AGENCY FAILED TO REBUT THE PRESUMPTION UNDER ILLINOIS LAW THAT CHILDREN BETWEEN THE AGES OF 7 AND 14 ARE NOT CAPABLE OF CONTRIBUTORY/ COMPARATIVE NEGLIGENCE.

It is well established in Illinois[1] that there is a rebuttable presumption that children between the ages of 7 and 14 are not capable of comparative negligence (called contributory negligence in Illinois). Koonce v. Pacilio, 718 N.E.2d 628 (Ill.App.1 Dist. 1999); Savage v. Martin, 628 N.E.2d 606 (Ill.App.1 Dist. 1993); and Wright By Wright v. Yellow Cab Co., 451 N.E.2d 1313 (Ill.App.1 Dist. 1983). Here, other than generally alleging contributory/comparative negligence on the part of the minor Respondent, Bryant Moore, Jr., Appellant Bi-State did not present the trial court with any credible evidence to

[1] There is no dispute that Illinois Law governs the substantive legal issues in this appeal. [Brief of Appellant, pg. 23]

rebut this presumption. Such evidence is mandated or the issue of the minor's comparative negligence should not go to the jury. Koonce, supra. and Savage, supra.

Stated another way, because the Appellant failed to rebut the presumption that children between the ages of 7 and 14 are not capable of comparative negligence, this Court must find as a matter of law that Bryant Moore, Jr. was not contributorily/ comparatively negligent. Accordingly, the verdict assessing Respondent a percentage of contributory/comparative fault should be reversed and this court should order the trial court to enter a verdict in Respondent's favor in the full amount of the judgment, $7,750,000.00, minus the setoff of $62,500.00, for a net verdict to Respondent of $7,687,500.00.

Specifically, on cross examination of the minor Respondent's parents[2], Bryant Moore, Sr. and Katie Berry, Appellant Bi-State elicited testimony regarding general instructions they gave to the minor Respondent (14 years old; D/O/B: July 26, 1984) (T. 327) about crossing the street at controlled intersections. (T. 363-366, and 495-498) The testimony elicited by Appellant Bi-State was that the minor Respondent was told how to cross a street at controlled intersections in a city environment near his home in Collinsville; his grandmother's home in Collinsville (T. 361) and his mother's home in East St. Louis. (T. 497-498) He was also given instructions regarding crossing the street at controlled intersections in downtown St. Louis near St. Louis Centre. (T. 497-498)

[2] Bryant Moore, Jr. could not testify due to the severity of his injuries.

Crossing the street in a city environment where there are curbs, sidewalks, designated bus stops, crosswalks and controlled intersections is drastically different from the circumstances, as more fully elaborated below, under which Bryant Moore, Jr. had to attempt to cross Caseyville Road in the early hours of January 25, 1999.

Neither of the minor Respondent's parents knew that Bi-State's bus driver, Carl Stroughter, was dropping Bryant Moore, Jr. off at a location that was not a designated bus stop, or even at a controlled intersection, (T. 361-362, 499) much less that Bi-State's driver was dropping him off along the edge of a narrow two lane road with a 45 mile per hour speed limit (T. 524) in the dark (T. 523) with no safe place to remain out of harm's way. (T. 557-558)[3] Witness Arcadio Aburto described the location where the minor Respondent was put off the bus on southbound Caseyville Road on January 25, 1999 at approximately 6:30 a.m. He stated that it was dark; that there was a 45 mile per hour speed limit; that the

[3] Appellant's Statement of Facts is in error on page 12 when it implies that Bryant Moore, Sr. knew that the minor Respondent was being dropped off somewhere other than the designated bus stop at Caseyville Road and Morrison (T. 371-372 and 522-523) because the football field for Collinsville High School runs along the eastern edge of Caseyville Road immediately north of its intersection with Morrison (Exhibits 16 and 20). See also the uncontradicted testimony of the minor Respondent's parents, Bryant Moore, Sr. and Katie Berry, that they did not know he was being dropped off where this accident occurred. (T. 362-362, 499)

bus did not pull off the road but stopped in the southbound lane to put Bryant Moore, Jr. off; and that the bus was stopped some 30 feet in front of his vehicle, which was stopped some 20 feet south of the rear service road to Collinsville High School, which meant that the bus was stopped some 45-50 feet south of the rear service road. (T. 437-440; See also Exhibits 16 and 20 attached). Bi-State's driver, Carl Stroughter, testified that the age of a passenger and where he drops them off makes a difference. (T. 551) More importantly, he categorically stated that putting a passenger off at the location described by Arcadio Aburto would be both inappropriate and dangerous because it was unsafe, particularly because the child would have to cross the oncoming traffic lane to get to a place of safety. (T. 556-558). But, that is exactly where Mr. Stroughter put the minor Respondent off the bus. As previously stated, the presumption that a child between the ages of 7 and 14 is incapable of comparative/ contributory negligence can be rebutted. However, to rebut this presumption Appellant Bi-State had to offer proof that Bryant Moore, Jr., based on age, mental capacity, intelligence and experience, was accountable for his actions and appreciated the dangers in crossing Caseyville Road. No such proof was adduced here by Appellant Bi-State. At most, Appellant Bi-State established that Bryant Moore, Jr. had been instructed by his parents on how to cross the street in a city environment with curbs, sidewalks, designated bus stops, crosswalks and controlled intersections. (T.363-366, and 495-498) This is insufficient as a matter of law to establish that Bryant Moore, Jr. appreciated the dangers when he was forced by the circumstances of his put off point to attempt to cross Caseyville Road so as to get to a place of safety, as confirmed/admitted by Appellant Bi-State's driver,

Carl Stroughter. (T. 556-557) Cates v. Kinnard, 626 N.E.2d 770 (Ill.App.3d 1994). Wright, supra.

Wright By Wright v. Yellow Cab Co. is on point. In Wright the minor plaintiff was injured when she was struck by a taxi cab as she attempted to cross the street. When questioned as to the minor plaintiff's safety training, Mrs. Wright stated that she had instructed plaintiff to look in both directions before crossing streets and that plaintiff appeared to follow her instructions. Further, on cross-examination Mrs. Wright testified that she started giving safety instructions to plaintiff before she started kindergarten, including instructions not to cross the street if an oncoming car was too close. supra. at 1316. The appellate court found upon reviewing this record that the defendants did not rebut the presumption that a child between the ages of 7 and 14 is incapable of contributory/comparative negligence. supra. at 1320. As set out above, the testimony of Bryant Moore, Jr.'s parents is virtually identical to the testimony of Mrs. Wright.

In Cates the Court found that the presumption that a child between the ages of 7 and 14 was incapable of negligence was rebutted because there was evidence that the 13 year old minor understood the dangers involved in riding a bike and the necessity of obeying a stop sign. No evidence of such awareness on the part of the minor Respondent here was presented by Appellant Bi-State either by fact or expert testimony.

In summary, Appellant Bi-State failed with any competent evidence to rebut the presumption that the 14 year old Respondent could be contributorily/comparatively negligent in attempting to cross the street to get to a position of safety when he was put off

the bus in a location that even Bi-State's driver testified was inappropriate, and unsafe. (T 556-557) Therefore, the Court erred in submitting the issue of Bryant Moore, Jr.'s contributory/comparative fault to the jury; a directed verdict or alternative a judgment notwithstanding the verdict should have been entered in Bryant Moore, Jr.'s favor on the issue of contributory/comparative fault and the trial court should now be ordered to reinstate the verdict herein in its entirety, minus the setoff for a net verdict to Respondent of $7,687,500.00.

CONCLUSION

Respondent Bryant Moore, Jr. respectfully requests the Court to affirm the trial court's judgment in his favor because Respondent made a submissible case under the law and the evidence. Further, Appellant's request for a new trial should be denied on the issue of juror misconduct because there was no juror misconduct or, alternatively, any failure to respond was unintentional, non-prejudicial and immaterial. Likewise, Appellant's request for a new trial based upon the submission of Instruction No. 5 should be denied because this verdict director was submitted in accordance with the guidelines of Rule 70.02(b) of the Missouri Rules of Civil Procedure and correctly submitted only ultimate issues without hypothesizing argumentative facts.

Finally, Respondent respectfully requests that this Court reverse the trial court on the issue of contributory/comparative negligence of the minor Respondent because Appellant failed to rebut the presumption under Illinois law that children between the ages of 7 and 14 are not capable of comparative/contributory negligence and order the trial court to enter a verdict in Respondent's favor of $7,687,500.00.

Respectfully submitted,

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_____

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of Respondent's Brief and a disk containing same were deposited on this _____ day of March, 2002, in the United States Mail, postage prepaid, addressed to: Mr. James E. Whaley and Mr. T. Michael Ward, BROWN & JAMES, P.C., Attorneys for Appellant, 705 Olive Street, Suite 1100, St. Louis, MO 63101.

_____
John D. Warner, Jr. - #30580

Subscribed and sworn to before me this _____ day of March, 2002.

_____

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Respondent's Brief complies with the limitations in Eastern District Rule 360, contains 13, 930 words, and that the computer disk filed with Respondent's Brief under Rule 84.06 and Eastern District Rule 361 has been scanned for viruses and is virus-free.

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John D. Warner, Jr. - #30580

APPENDIX